No. 704

In the Supreme Court of the United States

OCTOBER TERM, 1938.

AMERICAN TOLL BRIDGE COMPANY, a corporation,

Appellant,

vs.

RAILROAD COMMISSION OF THE STATE OF CALIFORNIA, WALLACE L. WARE, FRANK R. DEVLIN, RAY L. RILEY, RAY C. WAKEFIELD and LEON O. WHITSELL, as Members of and constituting the Railroad Commission of the State of California,

Appellees.

Brief of Appellant In Opposition to Motion to Dismiss or Affirm

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DATED: November 30, 1938.

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Brief of Appellant In Opposition to Motion to Dismiss or Affirm

This brief is being filed pursuant to Rule 7, Paragraph 3, of the Rules of this Court, in opposition to a motion to dismiss or affirm contained in a typewritten document entitled "Statement of Appellees Opposing Jurisdiction and Motion to Dismiss or Affirm" filed

by appellees with the clerk of the Supreme Court of California on November 12, 1938.

The sole ground of said motion is the claim that not one of the various important Federal questions at issue herein under Section 10 of Article I of the Constitution of the United States and Section 1 of Article XIV of the Amendments to the Constitution of the United States constitutes a "substantial" Federal question.

No authority is cited in support of this claim as to all or even any one of the various Federal questions at issue on this appeal. Only slight analysis will, we believe, be sufficient to show that there is no merit in the motion.

The opinion of the Supreme Court of California appears, in pamphlet form, in 96 Cal. Dec. 367.

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1. THE STATUTE OF THE STATE

As appears from "Statement of Appellant Respecting Jurisdiction of Court to Review Judgment Involved Herein", this is an appeal by American Toll Bridge Company from a judgment of the highest court of the State of California, to-wit, the Supreme Court of the State of California, rendered in a suit in which there was drawn in question the validity of a certain order, legislative in character, of the Railroad Commission of the State of California, on the ground of its being repugnant to the Constitution of the United States and the decision was in favor of

the validity of said order (See Appellant's Statement, Sections A and B and copy of Opinion of Supreme Court of California attached to said Statement as Appendix No. 5).

As required by Rule 12, Paragraph 1 of the Rules of Court, appellant's said Statement appropriately summarizes the pertinent provisions of said order. The first paragraph of Section B of appellant's said Statement reads as follows:

> "The order of the Railroad Commission of California was an order made and entered on February 8, 1938, Decision No. 30,612, reducing the tolls charged and collected by appellant from passengers and automobiles using appellant's Carquinez Bridge, a toll bridge constructed and operated across the Straits of Carquinez between the Counties of Contra Costa and Solano, State of California."

The exact wording of said order appears in appellant's Petition for Writ of Review filed with the Supreme Court of California, which Petition will be part of the Transcript of Record herein. The order refers to appellant's Carquinez Bridge tolls and reads as follows:

> "Public hearings having been held in the above entitled matter and the Railroad Commission having given full and careful consideration to the record before it and being of the opinion that the present rates of American Toll Bridge Company, referred to in this order, are unjust and unreasonable insofar as they differ from the rates herein prescribed which are hereby found to be just and reasonable rates, therefore,

"IT IS HEREBY ORDERED that American Toll Bridge Company shall file with the Commission, effective on and after March 1, 1938, a supplement to its tariff heretofore filed with the Commission on September 1, 1937 so as to change the items in its schedule of charges reading as follows:

"Passengers (7 years of age and older) on foot or in vehicles ..... $ .10
Auto only ..... .60

so as to read—

Passengers (7 years of age and older) on foot or in vehicles ..... .05
Auto only ..... .45

"IT IS HEREBY FURTHER ORDERED that American Toll Bridge Company shall, on or before the 25th day of each month, file with the Commission a report showing its balance sheet as of the close of the preceding month, an income and profit and loss statement for the preceding month, together with a detailed statement of revenues and expenses, and a statement of the traffic moving over each bridge, segregated so as to show the number of automobiles, the number of passengers, the number and classification of trucks, the tonnage of freight and the number and kinds of other vehicles, together with the gross revenue from each class of traffic.

"IT IS HEREBY FURTHER ORDERED that unless otherwise directed, the order herein shall become effective twenty (20) days from the date hereof."

That such an order, legislative in character, is a "statute" within the meaning of Section 237(a) of the Judicial Code is, we believe, too firmly established

to justify anything further than a reference to some of the leading decisions of this Court cited by us in Section G of appellant's said Statement.

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2. FEDERAL QUESTIONS INVOLVED

Appellees' references to the Federal questions here involved are fragmentary and distinctly inaccurate.

In order that the Court may have before it a complete and accurate statement of the points urged by appellant in reliance on the Constitution of the United States, we shall quote the various Assignments of Error which appellant has filed with the Clerk of the Supreme Court of California. In connection with each assignment, we shall then state merely enough to show that the Federal question is "substantial", realizing that this is not the time nor the occasion to brief or argue the case on the merits.

ASSIGNMENT NO. 1

"1. The Supreme Court of the State of California erred in holding and deciding that the Railroad Commission's order establishing the tolls to be charged and collected by appellant for pedestrians and automobiles using appellant's Carquinez Bridge over the Straits of Carquinez between the Counties of Contra Costa and Solano, State of California, did not impair the obligation of the contract evidenced by Ordinance No. 171 of the Board of Supervisors of said Contra Costa County, including the provisions of existing statutes which were read into and became a part of said contract, and the acceptance of the provisions of said Ordinance by appellant's assignor, within the meaning of Section 10 of Article I of the Constitution of the United States."

Said Ordinance No. 171 of the Board of Supervisors of Contra Costa County, California, is the ordinance

which granted the right to construct and operate the Carquinez Bridge. Said ordinance will be part of the Transcript of Record herein. The Supreme Court of California heretofore decided that said ordinance and the acceptance thereof constitute a *contract* between the State of California, acting through said Board of Supervisors, and American Toll Bridge Company.

County of Contra Costa v. American Toll Bridge Company, 10 Cal.(2d) 359.

It is conceded that Sections 2845 and 2846 of the Political Code of the State of California are read into said contract and are a part thereof. Said Sections will be quoted in various documents in the Transcript of Record. They also appear in appellees' said Statement and are part of that Code of the State of California which is known as the Political Code.

Appellant insists that under said contract the public authorities may not reduce the tolls originally fixed by the Board of Supervisors of said Contra Costa County in the ordinance granting the franchise, unless it appears that said tolls are yielding a return in excess of 15% on the rate base established by said Sections 2845 and 2846 of said Political Code.

The Railroad Commission has conceded and the Supreme Court of California found that the tolls from the Carquinez Bridge have never yielded and do not now yield a return anywhere near as much as 15% on said rate base. Nevertheless, the Railroad Commission made its order drastically reducing the existing tolls for the transportation of automobiles

and of passengers across the Carquinez Bridge in frank disregard of the contract on which the appellant relies, and the Supreme Court of California upheld the Railroad Commission in so doing.

The Railroad Commission has agreed that the words of said Sections 2845 and 2846 of the Political Code mean exactly what the appellant says they mean but the Commission disagreed as to the legal effect of said words.

As far as we can ascertain, no language such as that contained in the relevant portions of said contract has ever been before this Court.

Appellant is prepared to show, at the proper time, from said language and from the legislative history of the California statutes relating to the construction and operation of toll bridges, that the contract and the terms thereof are as claimed by appellant and that said order of the Railroad Commission impaired the obligations of that contract in violation of appellant's rights under Section 10 of Article I of the Constitution of the United States.

The only point made by appellees in their said Statement, in support of the proposition that "the contract impairment question is not substantial" is that the Supreme Court of California construed the contract differently from the construction relied on by appellant (Appellees' typewritten Statement, pp. 5-6). No authority is cited in support of appellees' said contention and we know of none.

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It is, of course, familiar learning that, while this Court will give consideration and weight to the views of the State's highest court, this Court is bound to decide for itself (a) whether a contract was made, (b) what are its terms and conditions and (c) whether the State has, by subsequent legislation, impaired the obligations of the contract. Some of this Court's most recent decisions to this effect are as follows:

New York Rapid Transit Corporation v. City of New York, 303 U. S. 573, 593;
Indiana v. Brand, 303 U. S. 95, 100;
United States Mortgage Co. v. Matthews, 293 U. S. 232, 236;
Coombes v. Getz, 285 U. S. 434, 441;
Larson v. South Dakota, 278 U. S. 429, 433;
Appleby v. City of New York, 271 U. S. 364, 379-80;
Detroit United Railway v. Michigan, 242 U. S. 238, 249, 251.

The Court will not hesitate, where it appears to be necessary to reach a conclusion differing from that of the State court, to reverse the decision of the State court as to whether a contract exists, as to what are its terms and conditions, or as to whether the obligations of the contract are impaired by subsequent State legislation. Such reversals are found in the following cases, among others:

Indiana v. Brand, 303 U. S. 95;
United States Mortgage Co. v. Matthews, 293 U. S. 232;

Coombes v. Getz, 285 U. S. 434;
Appleby v. City of New York, 271 U. S. 364;
Georgia Railway & Power Company v. Town of Decatur, 262 U. S. 432;
Detroit United Railway v. Michigan, 242 U. S. 238;
Terre Haute and Indianapolis Railroad Company v. Indiana, 194 U. S. 579;
Houston and Texas Central Railroad Company v. Texas, 177 U. S. 66;
Mobile and Ohio Railroad Company v. Tennessee, 153 U. S. 486;
Jefferson Branch Bank v. Skelly, 1 Black (66 U. S.) 436.

The independent examination to be made by this Court is just as applicable where part or all of the contract consists of a State statute which was construed by the State court as is the case where no statute is involved.

Indiana v. Brand, 303 U. S. 95, 100;
Coombes v. Getz, 285 U. S. 434, 441;
Freeport Water Company v. Freeport City, 180 U. S. 587, 595, 610;
Walsh v. Columbus, Hocking Valley and Athens Railroad Company, 176 U. S. 469, 475;
Jefferson Branch Bank v. Skelly, 1 Black (66 U. S.) 436, 443.

Appellees (Typewritten Statement, p. 4) state that "appellant does not challenge the authority of the Railroad Commission to fix its tolls". Thus baldly

stated, an entirely erroneous impression as to appellant's position may be conveyed. Appellant's position on this point is as follows:

1. Assuming that the Legislature of California may provide for the regulation of toll bridges by the Railroad Commission, the Commission may only exercise that power subject to the rights of appellant under its franchise *contract* with the State of California. This question is one of the impairment of contract obligations.

2. Assuming that the Legislature of California may provide for the regulation of toll bridges by the Railroad Commission and has done so by the Act of July 1, 1937 (St. 1937, ch. 896, p. 2473-2478), the Legislature, nevertheless, left fully effective the specific standard of reasonableness of rates of toll bridge companies established by the Legislature by the enactment of Sections 2845 and 2846 of the Political Code, even though the language of those sections be regarded as the language of regulation as distinguished from the language of contract. The failure of the Railroad Commission to follow said specific standard of reasonableness is a question of the denial of due process of law, which will hereinafter be further considered.

In either event, appellees' statement as to appellant's position is inaccurate and misleading.

Appellees' concluding paragraph under the heading of "Contract Impairment Question is not Substantial" reads as follows:

> "It is equally clear that the construction given to the provisions of the Political Code by the Supreme Court of California reveals that the judgment from which the appeal has been taken was one based upon a non-federal ground adequate to support such judgment."

In this paragraph, appellees switch from the issue whether appellant's contention with reference to the impairment of contract obligations presents a *substantial* Federal question to the entirely different issue whether the construction given by the Supreme Court of California to the contract "was one based on a *non-federal* ground adequate to support such judgment".

No authority is cited by appellees in support of the latter contention.

The mere fact that the Supreme Court of California construed the statutory provisions which are a part of the contract, does not convert the issue from a Federal question to a non-Federal question.

Nor can it be said that the decision of the Supreme Court of California on the one issue of impairment of contract obligations is "ground adequate to support the judgment", as claimed by appellees, or is "sufficient to conclude the case" (*Fox Film Corporation v. Muller*, 296 U. S. 207, 210), where there are at least half a dozen other important Federal questions in the case, each of which is independent of and in addition to the issue of impairment of contract obligations.

We find nothing in the decision of the Supreme Court of California which in any way justifies the claim that said decision is based on any non-Federal ground.

We respectfully submit that the issue of impairment of contract obligations raises a substantial Federal question and that there is no foundation whatever for appellees' claim that the decision of the Supreme Court of California on that issue was one based on a non-Federal ground or that said decision on said issue alone is "adequate to support the judgment".

ASSIGNMENT NO. 2

"2. The Supreme Court of the State of California erred in holding and deciding that the Railroad Commission's order did not confiscate appellant's property in said Carquinez Bridge and did not constitute a deprivation of said property without due process of law and did not deny to appellant the equal protection of the laws, within the meaning of Section 1 of Article XIV of the Amendments to the Constitution of the United States."

This issue, as is also the case with all those which follow, is independent of and in addition to the issue of the impairment of contract obligations. Appellees' statement (Typewritten Statement, p. 6) that appellant's claim of *confiscation* is based upon failure to receive a return of 15% upon the rate base established by Sections 2845 and 2846 of the Political Code of the State of California is entirely erroneous. *Appellant's claims, upon the issue of confiscation, are based upon the principles usually applicable to public utility and common carrier rate cases, just as though there were no contract at all in the case.*

The point urged by appellant is that upon the usual ascertainment of operating revenues, operating expenses of all classes, fair value and fair rate of return, the Railroad Commission's rates will confiscate appellant's property in the Carquinez Bridge.

The further and additional issue of confiscation based upon the fact that the property in the Carquinez Bridge is a *wasting asset* and will be lost to the owner at the end of *ten* years will be considered under Assignment No. 3.

It will be observed that the above Assignment No. 2 relates to the *Carquinez* Bridge alone. Reference to the additional situation of appellant's *Antioch* Bridge will be contained in subsequent assignments of error.

On the above issue, appellant's said Statement says (Section E, Paragraph 2):

> "The Railroad Commission's order confiscates the property of appellant in said Carquinez Bridge * * * because the tolls fixed by the Railroad Commission will fail to yield a fair return on the fair value of the property.
>
> "The reduction which the Railroad Commission made in the tolls of the Carquinez Bridge will have the effect of reducing the gross revenue of the bridge from $1,552,934.00 in 1937 to only $1,143,520.00 in 1938, being a reduction of 26.4%. The reduction in the net revenue will be from $963,816.00 in 1937 to $570,298.00 in 1938, being a reduction of 40.8%."

And yet appellees claim that this question is not substantial! (Typewritten Statement, pp. 6-7).

Appellees next say:

> "The fact is, as the Court's opinion fully explains, the Railroad Commission fixed rates to yield appellant 7½ per cent return upon the property value taken as a rate base. In the litigation below, appellant denied that the rates fixed would yield a return of 7½ per cent, but conceded that they would yield 6.6 per cent."

In denial of the statements just quoted, appellant is prepared to show, on the merits:

1. That the Railroad Commission's decision fails to make any of the following "basic or essential findings required to support the Commission's order" (*Florida v. United States*, 282 U. S. 194, 215) in a case involving the fixing of rates or tolls:

a. There is no finding of the fair value of the property or the fair rate base;

b. While the order purports to establish a rate for 1938, there is no finding as to what revenue the rate established by the Commission will produce in 1938 or in any subsequent year;

c. There is no finding as to the reasonable amount of maintenance and operating expenses and taxes to be paid in 1938 or in any subsequent year;

d. There is no finding as to a reasonable and proper allowance for depreciation or amortization in 1938 or in any subsequent year;

e. There is no finding as to how many dollars will remain in 1938 or in any subsequent year for return on the fair value of the property;

f. There is nothing whatever in the decision to show that the rates established by the Commission will yield a return of even 7.5 per cent on the fair value of the property. The entire matter is left to speculation and conjecture and this Court is called upon by the Commission to do the fact-finding work which it was the Commission's duty to do (see *West v. Chesapeake & Potomac Telephone Company*, 295 U. S. 662, 675).

2. That, while the Railroad Commission found that, because of the physical and financial hazards of this particular enterprise, the appellant is entitled to a return of 7½ per cent on some undisclosed fair value, the rates fixed by the Commission, if applied to the Carquinez Bridge alone and not also to the Antioch Bridge, would, in fact, yield a return not in excess of 6.6 per cent *on the lowest possible base figure shown in the record and entitled to consideration*, which figure is substantially less than *fair value*.

As we have hereinbefore pointed out, we are now considering the issue of confiscation upon the principles usually applicable to public utilities and common carriers in rate cases without taking into consideration the further fact that the title to the Carquinez Bridge will be lost to the owner, at the end of ten years from the present time, without the payment of any compensation to the owner.

Appellant has never conceded and does not now concede that said rates will yield a return of as much as 6.6 per cent on *fair value* or on any proper *rate base* figure. It is appellant's position, which it will be prepared to develop on brief and argument, that the rates established by the Commission would yield a return substantially less than 6.6 per cent on the fair value of appellant's property in the Carquinez Bridge.

3. That even a 6.6 per cent return would be

—less than the return of 7.5 per cent which the Commission found that appellant should receive;

—less than the actual cost in 1938 of all the money in the project, determined without dispute to be 7.851 per cent;

—less than the cost of money in connection with the original bond issue of 1925, admitted by the experts of both the Commission and the appellant to be 9.71 per cent;

—less than the cost of money in connection with the refunding bond issue of 1935, determined to be 8.95 per cent; and

—far less than would result from the Commission's usual policy of ascertaining the rate of return by applying a multiple to the cost of money.

4. That the facts relating to the construction and operation of the Carquinez Bridge, the pioneer toll bridge across San Francisco Bay, are sui generis and

that no proper conclusion with reference to the issue of confiscation as to this bridge can be reached without a careful consideration of all the relevant facts of this case, all of which will appear in the Transcript of Record.

It is respectfully submitted that appellees' claim that there is no substantial Federal question involved in this issue is entirely without merit.

ASSIGNMENT NO. 3

"3. The Supreme Court of the State of California erred in holding and deciding that the Railroad Commission's order did not fail to recognize and to give effect to the rights of appellant in a wasting asset, namely, the Carquinez Bridge, the title to which will revert to the Counties of Contra Costa and Solano on the expiration in 1948 of the franchise granted by said Ordinance No. 171 for the construction and operation of the Carquinez Bridge, and in holding and deciding that the Railroad Commission's order did not confiscate appellant's property in said Carquinez Bridge and did not constitute a deprivation of said property, without due process of law, and did not deny to appellant the equal protection of the laws, within the meaning of Section 1 of Article XIV of the Amendments to the Constitution of the United States."

This assignment of error is based on the unusual situation that the Carquinez Bridge is a "wasting asset", the title to which will be lost to appellant long before the expiration of the physical life of the structure. This result follows from the fact that the term of the franchise is only twenty-five years and that the franchise expressly provides that on its expiration (which will be only ten years from the present time), the title to the bridge will revert to the two adjacent Counties of Contra Costa and Solano without the payment of any compensation to the owner of the bridge.

Unless the investors have had returned to them their investment, with reasonable interest and dividends, before the expiration of the term of the franchise in 1948, they will have lost the same irretrievably.

This assignment of error is quite different from the preceding assignment. That assignment urged confiscation based upon the principles usually applicable in public utility and common carrier rate cases. Under the assignment now urged, confiscation is revealed by failure to earn, in the case of a "wasting asset" which will be lost to the owner at the end of ten years, sufficient money to return to the owner, within that time, the remaining portion of the investment plus reasonable interest on the bond money and reasonable dividends on the stock money.

We have not found any decision of this Court based on a similar state of facts and believe that in this respect the case is one of first impression.

The record shows that during the period from the granting of the franchise in February, 1923 to December 31, 1935, appellant's earnings, either from the Carquinez Bridge or from the Antioch Bridge or from both bridges together, were insufficient to permit the payment of *any* dividend.

The Railroad Commission, conceding the status of the Carquinez Bridge to be that of a "wasting asset", nevertheless took the position that the Commission is not at all concerned with what may have happened prior to the Act of July 1, 1937 (St. 1937, ch. 896, pp. 2473, 2478) which, for the first time, undertook

to confer upon the Railroad Commission jurisdiction over toll bridges. The Commission took the position that it was concerned only with the *future* and particularly with the question whether or not the tolls would be sufficient to amortize the remaining portion of the investment during the remaining term of the franchise, without regard to whether or not proper *interest* and reasonable *dividends* had been paid.

On this subject, the position of the appellees is stated as follows (Typewritten Statement, p. 7):

> "It is suggested in the Assignment of Errors that the Commission failed to recognize and give effect to the rights of appellant 'in a wasting asset.' On the contrary, the Supreme Court of California correctly states that the Commission, in computing the net annual receipts, made allowances for depreciation reserves, including amortization of the entire investment before the expiration of the franchise period."

The Court will note that while appellees concede the necessity of rates high enough to amortize the remaining portion of the principal of the investment before the expiration of the franchise period, no reference whatever is made to the necessity of permitting appellant to earn sufficient money to pay *interest* on bond money and *dividends* on stock money.

We are prepared to show, in brief and on argument on the merits, that the undisputed testimony shows the following situation with reference to this "wasting asset":

1. That at the end of the franchise period in 1948, the revenues from the rates now fixed by the Railroad Commission will have failed to retire the remaining portion of the investment, in the 437,167 shares of stock of the par value of $1.00 per share will not have been retired;

2. Furthermore, that said revenues will have failed to apply as much as a single dollar on the $2,404,600.00 of dividends which the Company failed to earn and declare during the period from May 21, 1927 to December 31, 1935, said figure of $2,404,600.00 including nothing whatever for interest on unpaid dividends; and

3. Finally, that unretired capital stock at $1.00 per share plus unpaid dividends, will amount, at the end of the franchise period, to the sum of $2,841,767.00.

We respectfully submit that it is too clear for argument that the "wasting asset" issue thus presented constitutes a substantial Federal question.

ASSIGNMENT NO. 4

"4. The Supreme Court of the State of California erred in holding and deciding that the Railroad Commission's order did not confiscate appellant's property in both the Carquinez and the Antioch Bridges and did not constitute a deprivation of said property without due process of law and did not deny to appellant the equal protection of the laws, within the meaning of Section 1 of Article XIV of the Amendments to the Constitution of the United States."

This assignment raises the issue of confiscation as to appellant's property in *both* the Carquinez and the Antioch Toll Bridges, determined in accordance with the usual rate making principles.

As bearing on the substantial character of this Federal question, we shall be prepared to show, on brief and argument:

1. That appellant's Antioch Bridge is located across the same water barrier as the Carquinez Bridge, only about twenty-five miles distant;

2. That both bridges were constructed by appellant at the same time as parts of a single, unified transportation system and that both bridges have at all times been operated by appellant as parts of one and the same enterprise;

3. That both bridges serve largely the same territory and the same traffic, that they are distinctly *competitive* with one another and that the inevitable effect of a reduction in the rates of the Carquinez Bridge will be to force a similar reduction in the rates of the Antioch Bridge;

4. That it was the Railroad Commission's duty to consider both bridges together and to fix the tolls to be charged by both and to grant appellant's motion to that effect;

5. That the application to both bridges of the tolls established by the Railroad Commission for the Carquinez Bridge alone would reduce appellant's return to not more than 5.6 per cent on the lowest possible base figure shown in the record and entitled to consideration, which figure is substantially less than "fair value"; and

6. That a return of even 5.6 per cent on both bridges together would be—

(1) 7.5%—5.6%=1.9% below the rate of return which the Commission found would be reasonable for the Company;

(2) 9.71%—5.6%=4.11% below the cost of bond money actually used in the construction of the Company's bridges; and

(3) 8.95%—5.6%=3.35% below the cost of money resulting from the bond refunding operation of 1935.

We shall be prepared to urge that, bearing in mind the specific facts of this case, including physical and financial hazards attending the construction of these bridges, the Railroad Commission's tolls will, if permitted to become effective, confiscate appellant's transportation system, consisting of the Carquinez and the Antioch Bridges, and will violate appellant's rights under Section 1 of Article XIV of the Amendments to the Constitution of the United States.

We submit that the Federal question presented by the above assignment of error is clearly substantial.

ASSIGNMENT NO. 5

"5. The Supreme Court of the State of California erred in holding and deciding that the procedure before the Railroad Commission was not unfair, unjust and arbitrary and did not constitute a denial to appellant of due process of law and did not deny to appellant the equal protection of the laws, within the meaning of Section 1 of Article XIV of the Amendments to the Constitution of the United States."

We shall be prepared to show that the Railroad Commission made no finding as to the fair value of the property or the fair rate base, which point has

been conceded by counsel for the Commission, and to urge that said failure constitutes denial of due process of law, entirely apart from and in addition to the issues of confiscation.

Furthermore, Assignment No. 5 is a general assignment which will be developed in more detail in connection with the later more specific assignments of error, all dealing with denial of due process of law.

ASSIGNMENT NO. 6

"6. The Supreme Court of the State of California erred in failing to hold that, even though the language of Sections 2845 and 2846 of the Political Code of the State of California be regarded as the language of regulation and not the language of contract, the Legislature of 1937, in declaring toll bridges to be public utilities, did not amend or repeal said Sections of the Political Code or any part thereof and that it was the duty of the Railroad Commission, stepping into the shoes of the Board of Supervisors of said Contra Costa County, to follow, in fixing appellant's said tolls, the rate making standard fixed and prescribed by the Legislature with reference to toll bridges, in said Sections 2845 and 2846 of the Political Code, and said Supreme Court of the State of California further erred in failing to hold that the Railroad Commission's failure to follow the standard of reasonableness of rate making for toll bridges theretofore established by the Legislature constituted a denial to applicant of due process of law and a denial of the equal protection of the laws, within the meaning of Section 1 of Article XIV of the Amendments to the Constitution of the United States."

We believe that this proposition speaks for itself. We are prepared to show:

1. That even if the language of said Sections 2845 and 2846 of the Political Code of California be regarded as the language of regulation and not the language of contract, said sections established a standard of reasonableness applicable to the fixing of tolls to be charged by toll bridge com-

panies in California and that said standard of reasonableness is still the law of California insofar as toll bridge companies are concerned;

2. That appellant had the legal right to have that standard of reasonableness applied by the Railroad Commission in its investigation into the Carquinez Bridge tolls; and

3. That the Railroad Commission's failure and refusal to apply that standard of reasonableness and its action in substituting another standard not authorized by law constitute a denial to appellant of due process of law in violation of its rights under Section 1 of Article XIV of the Amendments to the Constitution of the United States.

That this question is substantial will, we believe, hardly be doubted by the Court.

ASSIGNMENT NO. 7

"7. The Supreme Court of the State of California erred in holding and deciding that the Railroad Commission's order, severing the Antioch Bridge from appellant's single, unified transportation system, and fixing tolls for the Carquinez Bridge alone, notwithstanding the fact that the record shows without dispute that the inevitable effect of the reduction of tolls on the Carquinez Bridge would, by the force of competition between the two bridges, compel appellant to make a similar reduction in the tolls charged on the Antioch Bridge, was not unfair, unjust and arbitrary action and did not deny to appellant due process of law and did not deny to appellant the equal protection of the laws, within the meaning of Section 1 of Article XIV of the Amendments to the Constitution of the United States."

This proposition is based, primarily, on the fact that the Carquinez and the Antioch Bridges are largely *competitive,* so that reduced tolls on one of

these bridges will necessarily and inevitably force reduced tolls, in like amount, on the other bridge. Both bridges are owned and operated by the same company (the appellant herein) and it seems very clear that a rate fixing public authority undertaking to fix tolls to be charged by appellant cannot fairly and properly confine its consideration to the more profitable one of the two bridges and refuse to fix tolls for the less profitable bridge.

We are prepared to show that, on the facts of this case, which will be fully set forth in the Transcript of Record, the Railroad Commission's exclusion of the Antioch Bridge and its establishment of tolls for the Carquinez Bridge alone, without taking into consideration the inevitable necessity for appellant to make a like reduction in the tolls of the Antioch Bridge, with the resulting effect of confiscation of appellant's transportation system, consisting of both the Carquinez and the Antioch Bridges, was so unfair, unjust and arbitrary as to constitute denial of due process of law within the rule established by this Court in many decisions, including the following:

Interstate Commerce Commission v. Union Pacific Railroad Company, 222 U. S. 541, 547;

State of Washington, ex rel. Oregon Railroad and Navigation Company v. Fairchild, 224 U. S. 510, 524;

Great Northern Railway Company v. State of Minnesota, 238 U. S. 340, 345;

Northern Pacific Railway Company v. Department of Public Works of the State of Washington, 268 U. S. 39, 45.

That such a question is substantial, we do not doubt.

ASSIGNMENT NO. 8

> **"8. The Supreme Court of the State of California erred in holding and deciding that the procedure before the Railroad Commission, particularly the institution of the case by the Railroad Commission on its own motion by a mere order or notice of inquiry without the filing of a complaint or the making of any charges, and the conduct of the inquiry thereafter without the formulation of any issues by the filing of answer or in any other way, and the Railroad Commission's failure to advise appellant at any time or in any way, prior to the decision, of the Government's proposals, did not deny to appellant due process of law and did not deny to it the equal protection of the laws, within the meaning of Section 1 of Article XIV of the Amendments to the Constitution of the United States."**

The same point is thus stated in Section E, Paragraph 3, of appellant's Statement:

> "The entire procedure before the Railroad Commission constitutes a denial of due process of law for each of the reasons specified in the assignment of errors, including, particularly, the reason that the case was instituted by the Railroad Commission on its own motion by a mere order or notice of inquiry without the filing of a complaint or the making of any charges and the inquiry was thereafter conducted without the formulation of any issues by the filing of answer or in any other way and the Railroad Commission failed to advise appellant at any time or in any way, prior to the decision, of the Government's proposals, all in denial of the requirements of due process of law as most recently established by this Court in *Morgan v. United States*, 304 U. S. 1."

Here, as in the *Morgan* case, appellant was brought into contest with the Government (the State) in a

quasi-judicial proceeding aimed at the control of appellant's activities.

Here, as there, the Government (the State) prosecuted the proceeding. Here, as there, the proceeding had all the elements of contested litigation, with the Government and its counsel on the one side and appellant and its counsel on the other.

We shall be prepared to show, on brief and argument, that

(1) Here, as in the *Morgan* case the proceeding was initiated by a mere order or notice of inquiry. Copy of the document is attached to the Petition for the Writ of Review as Exhibit "B". Said document merely provides for an investigation into "the rates, charges, contracts, classifications, rules and regulations" of appellant in the operation of the Carquinez Bridge. Where, among all these matters, the lightning would strike, or what the State's proposals were, appellant at no time prior to the decision, had any means of knowing.

(2) Here, as in the *Morgan* case, no complaint was ever filed and under the Commission's procedure in the relatively few cases of investigation *on the Commission's own motion*, none was required.

(3) Here, as in the *Morgan* case, no answer was ever filed and no issues were ever framed by any pleadings.

(4) Here, as in the *Morgan* case, the State a no time prior to the decision, ever advised appel lant of what it proposed to do, by means of pro posed findings or by any other means.

(5) Here, as in the *Morgan* case, the State did not make known what it proposed, by any oral argument or by any brief setting forth such proposals.

The following language from the *Morgan* case applies exactly to the present situation (p. 19):

> "And the appellants had no further informa tion of the Government's (State's) concrete claims until they were served with the Secre tary's (Railroad Commission's) order."

At page 7 of their typewritten Statement, appellee state that the proceeding before the Railroad Com mission "was initiated in the usual manner" by a order instituting an investigation into the reasonable ness of appellant's rates. However, it will be conceded that almost all the cases before the Railroad Commi sion of California are handled by formal complai by third parties and by formal answer thereto. T question now before this Court does not relate those cases, in which issues are framed in the usu manner by complaint and answer, but only to t comparatively rare cases in which the proceedin are initiated by the Railroad Commission itself its own motion and only to those of such cases which the Railroad Commission fails to advise t

defendant, prior to the actual decision, of what the Commission's proposals are.

We believe that this question is one of the most important issues in the present case. The question is—Is there any reason why the principle of the *Morgan* case, clearly applicable to the proceedings of *Federal* administrative tribunals, is not equally applicable to the proceedings of *State* administrative tribunals?

We shall be prepared to urge that the principle is applicable to *all* administrative tribunals, whether established by the *Federal* government or by a *State* government.

We shall urge that the decision in the *Morgan* case is squarely applicable to our case and that on the basis of that decision alone, the judgment of the Supreme Court of California should, after brief and argument, be reversed.

It is inconceivable to us that anyone should seriously urge that this Federal question is not substantial.

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3. SUBSTANTIAL FEDERAL QUESTIONS—APPLICABLE PRINCIPLES

We understand that cases dismissed by this Court for want of a substantial Federal question are largely those in which the Federal question or questions are found to be "frivolous" or in which the Federal question or questions are deemed to be foreclosed by well settled principles enunciated in prior decisions of this Court.

Obviously, the present case falls within neither category.

Rather, we submit, are the Federal questions in the present case questions which "require analysis and exposition for their decision" within the rule laid down by this Court in *Milheim v. Moffat Tunnel Improvement District*, 262 U. S. 710. At page 716, the Court said:

> "The federal question presented, being one which requires analysis and exposition for its decision, is not frivolous; and the motion to dismiss the writ of error is accordingly denied."

Likewise, we have in mind what this Court said in *Louisville & Nashville Railroad Company v. Melton*, 218 U. S. 36. In denying a motion to dismiss, based upon the claim that the Federal question relied upon had been so conclusively foreclosed by prior decisions of the court as to be frivolous and, therefore, not adequate to confer jurisdiction, this Court said (p. 49):

> "The contention may not prevail, even although it be admitted that a careful analysis of the previous cases will manifest that they are decisive of this. We say this because, for the purpose of the motion to dismiss, the issue is not whether the Federal question relied upon will be found upon an examination of the merits to be unsound, but whether it is apparent that such question has been so explicitly foreclosed as to leave no room for contention on the subject, and hence cause the question to be frivolous. That this is not the case here we think results from the following consid

erations a, because analysis and expounding is necessary in order to make clear the decisive effect of the prior decisions upon the issue here presented * * * "

Also, we do not believe that the various Federal questions herein at issue could be satisfactorily decided without brief and argument on the merits.

Finally, on the question whether or not the Federal questions herein at issue are substantial, we respectfully refer the Court to its recent decision in *Hamilton v. Regents of the University of California*, 293 U. S. 245. At page 258, this Court said:

> "And the appellees insist that this appeal should be dismissed for the want of a substantial federal question. But that contention can not be sustained; for we are unable to say that every question that appellants have brought here for decision is so clearly not debatable and utterly lacking in merit as to require dismissal for want of substance." (Citing authorities).

We respectfully submit that in the present case it cannot possibly be said that *each* of the various Federal questions "is so clearly not debatable and utterly lacking in merit as to require dismissal for want of substance".

In fact, we hope to be able to show, on brief and argument, that *all* of the Federal questions on which we rely are substantial and meritorious.

As the only point urged in support of the motion to dismiss or affirm is that none of the Federal ques-

tions are substantial, and as the claim is obviously without merit, we respectfully submit that appellee's motion should be denied and that the appeal be heard on the merits, on brief and argument.

Dated at San Francisco, California, this 30th day of November, 1938.

MAX THELEN,
Attorney for American Toll Bridge Company, Appellant.

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